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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 57

W. E. HOWARD, JR., PETITIONER

v.

KENNETH T. LYONS AND JOSEPH S. McATEER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 23–25) is not reported. The opinion of the United States Court of Appeals for the First Circuit (R. 35–42) is reported at 250 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1958 (R. 42). By order of Mr. Justice Frankfurter, dated April 9, 1958, the time for filing a petition for a writ of certiorari was extended to, and including, April 28, 1958 (R. 43). The petition was filed on April 28, 1958, and was granted on June 9, 1958 (*ibid.*). 357 U. S. 903. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a federal executive officer below cabinet rank has absolute immunity from defamation liability with regard to the communication of an official report to members of Congress when such communication is made as part of the officer's duty and relates to matters committed by law to his control and supervision.

STATEMENT

This is a libel suit brought by two civilian employees of the Boston Naval Shipyard against the petitioner, Rear Admiral W. E. Howard, Jr., the commanding officer of the shipyard. The alleged libel was contained in an official report written by Admiral Howard to two of his superior officers, copies of which were sent to the members of the Massachusetts congressional delegation. The District Court, on May 8, 1957, granted petitioner's motion for summary judgment on the ground of absolute privilege. On appeal, the Court of Appeals (Judge Woodbury dissenting) reversed the judgment in favor of petitioner and ordered the case remanded for further proceedings (R. 35–42).

1. The District Court found that the pleadings and affidavits filed in support of the motion showed "conclusively that the statements attributed to [petitioner] were published by him in the discharge of his official duties and in relation to matters committed to him for determination" (R. 23). The factual background for this finding may be summarized as follows:

The respondents are civilian employees of the Department of the Navy, employed at the Boston Naval

Shipyard. Both are officers of the Federal Employees Veterans Association, Inc., an organization composed of veterans of military service in the employment of the Federal Government (R. 2). Respondent Lyons is National Commander of the Association and respondent McAteer is Commander of its Post No. 1 at the Boston Shipyard. The purpose of the organization, as stated in its "Constitution and By-Laws," is the protection of the rights of veterans with respect to the terms and conditions of their federal employment (R. 10).

The Association was accorded official recognition by the shipyard administration as an employees' representative group in 1949 (R. 9). Its officers regularly met with representatives of the shipyard management in regard to employment problems and policies, and it provided personal representation for members at grievance and disciplinary hearings. The Boston Naval Shipyard Post issued to its members, on an approximately monthly basis, a type of "newsletter" containing information purportedly of interest to them.[1] In addition, the organization has sponsored civil litigation on behalf of its members in the federal courts.[2]

After a time, the shipyard administration found that the activities of the Association were becoming

[1] A typical issue of this publication—that of August 1955—is reprinted at R. 26–35. Several issues were attached as enclosures to Admiral Howard's official report which constitutes the alleged libel. They were also attached as an exhibit to the answer.

[2] One such action is discussed in the sample newsletter (R. 29).

increasingly disruptive of good industrial relations and were having a detrimental effect on employee morale. The details of the administration's conclusions were set out in the report which is the subject matter of this litigation (R. 8–15).

In the report, addressed to the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, Admiral Howard stated that the newsletters published by the Association had become severely critical of shipyard management and of the Navy and Defense Departments, to the point of being defamatory; that the purpose of the newsletter was to thwart the aims of the administration in the accomplishment of its mission and to further the personal self-interest of the Association's officers; that management meetings with the Federal Employees Veterans Association, in contrast to those with other recognized employee groups, were seldom productive of useful and constructive results primarily because of the Association's insistence on magnifying trivialities and its scornful attitude toward management personnel; that the Association's activities were subversive of shipyard management; that the situation was aggravated by the fact that the Association gave wide publicity to its charges by placing copies of its newsletters with the local press and with members of the Massachusetts congressional delegation; and that, because of the adverse effect of these activities on efficient shipyard operation, and in an effort to protect responsible employee groups, recognition of the Association would be withdrawn.

This report, setting forth the basis of his action in withdrawing recognition, was sent by Admiral Howard, as Commander, Boston Naval Shipyard, to the two addressees—the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, both in Washington. Copies of the Association's newsletters were attached as enclosures. A copy of the report was sent by Admiral Howard to each member of the Massachusetts congressional delegation because of their known interest in employee relations at the shipyard, because they were known to have received copies of the Association's newsletters, and because they had received copies of charges made by the Association against the shipyard management and an official Navy report of an investigation of those charges (R. 12, 14, 22). In addition, Admiral Howard officially notified the Association by letter that recognition was being withdrawn (R. 15).

In accordance with applicable Navy regulations, Admiral Howard transmitted copies of the report to the Commandant, First Naval District, who in turn authorized their routine release through the District's Public Information Officer to the editors of various newspapers in Boston (R. 21). Admiral Howard, the sole defendant in this case, did not release the report to any representative of the press (R. 23).

It was stated in an affidavit by Admiral Howard's immediate commanding officer (R. 20–21) that the preparation of the report and its transmittal to the addressees and to the District Commandant were all included among Admiral Howard's official duties and

were done in the course of performing those duties; that also included among his duties was "the furnishing of copies to the Massachusetts congressional delegation of his official notification to the Bureau of Ships of personnel action taken by him as Commander, Boston, Naval Shipyard." In addition, Admiral Howard stated in his own affidavit that he sent copies of the communication to the Congressmen "[i]n the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, * * *" (R. 22). These affidavits were uncontroverted and, aside from the formal papers, constitute the entire record in the case.

2. In reversing the District Court's judgment, the Court of Appeals (Judge Woodbury dissenting) recognized that petitioner was absolutely privileged with respect to the communication of the report to his superior officers and that this privilege was not affected by his awareness that a higher authority, over whom he had no control, would undoubtedly release a copy of the report to the press. But the court held that, with respect to the communication of the report to members of Congress, petitioner was entitled only to a qualified privilege, requiring him at a trial to satisfy a jury of his good faith. This requirement was imposed despite the fact, as the court acknowledged, that the report related to a matter in which the Congressmen had an official interest, the fact that petitioner considered the communication of the report to the Congressmen to be a proper exercise of his official

duty, and the fact that the communication was made, as the court itself noted, "in the course of the performance of his executive functions * * *" (R. 39).

The court added that it would reach this result regardless of whether it applied "federal common law" or the law of Massachusetts, and declined to decide which body of law was applicable. In this connection, however, the court posed the following question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say?" (R. 40).

In his dissent, Judge Woodbury equated the communication of the report to members of Congress with the communication of the report to petitioner's superior officers, since both were part of petitioner's official duties. In addition, Judge Woodbury stressed the policy of keeping members of Congress informed with respect to matters pertinent to their legislative duties and functions (R. 41–42).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals presents one basic question for this Court's determination: whether a federal executive officer is absolutely privileged in sending to interested Congressmen, pursuant to the officer's duty, copies of an official report addresssed to his superior officers.

In resolving this issue, the Court is not restricted by the law of the state in which the communication is published but is free to apply its own rule which will

be generally applicable to official communications of officers of the Federal Government regardless of where the communications are made. The problem is one which is national in scope, involving, as it does, the nature of the authority of federal officials and the extent to which a federal interest requires that they be protected from civil and criminal liability for acts done in the performance of their duties. This reasoning led the Court long ago to hold that federal law, formulated by the federal courts, must control the question of whether officers of the Government could be subjected to criminal prosecution for official acts. *Tennessee* v. *Davis*, 100 U. S. 257; cf. *In re Neagle*, 135 U. S. 1. Precisely the same reasoning requires that federal law be applied in cases of civil liability as well. The policies under consideration are, in both cases, dominated by the federal interests involved, and, in both cases, the central legal relations have their source in federal law. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301.

A

In this case, uncontroverted affidavits established that, in transmitting to members of the Massachusetts congressional delegation copies of his official report to his superior officers, petitioner was performing an official duty as commanding officer of the Boston Naval Shipyard. His action constituted nothing more than compliance with a departmental policy that members of Congress be kept informed by commanding officers of matters in which the Congressmen are known to have an official interest. Under the well-

established federal rule, stemming from this Court's decision in *Spalding* v. *Vilas*, 161 U. S. 483, this conduct is wholly immune from liability in defamation. The clear meaning of this rule of immunity is that an officer of the Government will not be subjected to such liability for statements made within the scope of the authority of his office; and this result will be reached without the necessity of a jury inquiry into questions of motivation and reasonableness of conduct.

The court below held that the applicable precedents required the conclusion that petitioner be accorded an absolute privilege with respect to the transmittal of the report to his superior officers. However, the court departed from the underlying premise of the rule in refusing to accord such a privilege to the communication of copies of the report to interested Congressmen, although it recognized that this was equally a part of petitioner's duties. Cf. *Barr* v. *Matteo*, 244 F. 2d 767 (C. A. D. C.), judgment vacated, 335 U. S. 171. We do not perceive any sound basis, and none was suggested by the Court of Appeals, for distinguishing between the two.

B

The courts have recognized, in both defamation and non-defamation cases, that adequate protection of the interests which give rise to the immunity requires that the immunity be absolute, without a jury determination of the propriety of the action taken by the officer in the course of performing his official duties. *E. g.*,

Spalding v. *Vilas, supra; Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949. In defamation cases, the risks of a trial on questions of motivation, of the necessity for the particular means of publication chosen, and of the justification for the language used, are so substantial that the requirement of a trial will itself deter proper performance of duties. Action taken for improper reasons, or to accomplish improper results, can be dealt with by appropriate disciplinary measures, but that is quite another matter from subjecting the innocent official, as well as the guilty, to the burden of a trial as well as to the substantial risk of personal liability.

C V

The fact that petitioner is not of cabinet rank did not justify the departure by the court below from the principles of *Spalding* v. *Vilas, supra.* It is not a particular class of officials that the immunity rule is designed to protect but rather the important public functions which must be performed by officers at various levels. Given the present complexity of governmental operations, it is obvious that much of the business of government must be carried on by subordinates and that these officials perform policy-making functions which involve judgment and discretion. When public statements are made in the course of performing those duties, the policy underlying the absolute privilege fully applies.

ARGUMENT

INTRODUCTION: THE GOVERNING LAW

Prior to the decision of the Court of Appeals in the present case, all of the lower federal courts which have dealt with the question of immunity of federal officers from comparable tort liability have assumed that the issue was governed by federal law and not controlled by the law of the state in which the federal court was sitting. The court below raised this question but found it unnecessary to resolve it, since, in the court's view, the same result would be reached regardless of whether it applied federal law or the law of Massachusetts (R. 40–41). A view favorable to the choice of federal law, however, is suggested by the court's formulation of the question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say?" (R. 40).[2]

We believe that this question must be answered in the affirmative. The issue was long ago settled

[2] Since there is complete diversity of citizenship of the parties (R. 2), no problem of original federal question jurisdiction is involved. See *Johnston* v. *Earle*, 245 F. 2d 793 (C. A. 9); *Viles* v. *Symes*, 129 F. 2d 828 (C. A. 10), certiorari denied, 317 U. S. 633. Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667; *Gully* v. *First National Bank in Meridian*, 299 U. S. 109; *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149.

by this Court in *Tennessee* v. *Davis*, 100 U. S. 257. There, the Court sustained the constitutionality of Section 643 of the Revised Statutes (now contained in 28 U. S. C. 1442), which provided for removal to the federal courts of any state civil or criminal action against a federal revenue officer "on account of any act done under color of his office." The Court held that such a suit, at least for the purpose of removal jurisdiction, was a case "arising under" the laws of the United States. Cf. *Johnson* v. *Maryland*, 254 U. S. 51; *In re Neagle*, 135 U. S. 1. This was so even though the cause of action or criminal prosecution was based on state law and the only federal question was the defense that the officer committed the act complained of while in the performance of his official duties. It necessarily follows that the questions of whether a federal officer is acting within the scope of the authority of his office, and whether this constitutes a defense to a state civil or criminal charge, are federal questions governed by federal law alone. "The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them." 100 U. S. at 266. The Court noted that the source of this federal law, formulated by the federal courts, is found in the statutes which create the office and the duties incident thereto and

which by implication afford a substantive defense to the officers executing them.[4]

A uniform federal rule governing the immunity of federal officers is surely just as essential in defamation suits as in state criminal prosecutions. The desirability of uniform results, not varying with the peculiarities of local law, is present with equal force.[5] In both cases, since the controlling factor is generally the scope of the defendant-officer's official duties, the problem becomes one of the relationship of the officer to the Federal Government he serves, which must of necessity be determined by the law of that government. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301.

Especially is this so in view of the nature of the issue. In no area of law is it more clear that a deci-

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[4] Quoting from Chief Justice Marshall in *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 865, the Court declared (100 U. S. at 265):

"The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

[5] For similar reasons, the Court of Appeals for the First Circuit has held, in an analogous case, that federal law controls the liability of a common carrier transmitting an interstate message containing defamatory matter. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539.

sion depends upon a delicate balancing of two competing considerations. As stated by this Court in *Barr* v. *Matteo*, 355 U. S. 171, 172, the question of immunity involves "on the one hand protection of the reputation of individuals, and on the other the interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties * * *."[6] The worth of the federal official's conduct, its lawfulness and justification, do not vary with the locality where the conduct takes place. These are matters of national interest, and, accordingly, the policy determinations should be made by those courts whose reach transcends state boundaries and which are subject to this Court's ultimate supervision.[7]

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[6] See Holmes, *Privilege, Malice, and Intent*, 8 Harvard L. Rev. 1, 3: "[W]hether, and how far, a privilege shall be allowed is a question of policy. * * * [T]he worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts."

[7] No different conclusion is required by the fact that the plaintiff's cause of action in a defamation suit is based on a state-created right and that jurisdiction is accordingly based on diversity of citizenship. It is quite clear that, even in diversity cases, some of the issues may be governed by federal law. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 175–177. As to such issues, the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, has no applicability. Cf. *United States* v. *Standard Oil Co., supra; Clearfield Trust Co.* v. *United States*, 318 U. S. 363. It should also be noted that the legal proceeding involved in *Tennessee* v. *Davis*, *supra*, similarly arose out of state law.

A FEDERAL EXECUTIVE OFFICER IS NOT SUBJECT TO DEFAMATION LIABILITY FOR SENDING TO INTERESTED CONGRESSMEN, PURSUANT TO THE OFFICER'S DUTY, COPIES OF AN OFFICIAL REPORT ADDRESSED TO HIS SUPERIOR OFFICERS

A. *Under established principles, acts of executive officers within the scope of their official duties are absolutely privileged*

Petitioner's motion for summary judgment on the ground of absolute privilege was supported by affidavits of petitioner and his commanding officer. These affidavits established that the preparation of the report, its transmittal to the addressees, and the sending of copies to the Congressmen, were all done by petitioner in the performance of his official duties, and that the report itself was concerned solely with matters committed by law to petitioner's control and supervision as commanding officer of the Boston Naval Shipyard (R. 20–23). Respondents did not attempt to controvert these statements by counter-affidavits or other documents. Accordingly, although the District Court and Court of Appeals arrived at different conclusions, both of them premised their decisions on this basic fact (R. 23, 39).

Admiral J. A. Snackenberg, as Commandant of the First Naval District, was petitioner's immediate commanding officer and thus the most relevant source of information regarding the scope of petitioner's authority and the nature and extent of his official duties.

Admiral Snackenberg stated that petitioner, at the time the alleged libel was written and published, was on active duty with the Navy as Commander of the Boston Naval Shipyard and that included among his official duties was "the making of reports to the Bureau of Ships, United States Navy, relative to any significant action taken by him with respect to the personnel, civilian or military, employed or stationed at the Boston Naval Shipyard" (R. 20–21). Certainly, the withdrawal of official recognition of an employees' representative group constituted significant personnel action, so that petitioner had not only the legal authority but the positive duty to make the report explaining his action, upon which respondents seek to base liability.

Admiral Snackenberg stated further that the furnishing of copies of this report of personnel action to members of the Massachusetts congressional delegation was included within petitioner's official duties (R. 21). In addition, petitioner stated in his own affidavit that he sent copies of the report to the Congressmen "[i]n the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, * * *" (R. 22). This communication was necessitated by the fact that petitioner, as commanding officer of the shipyard, was aware of the Congressmen's knowledge of, and interest in, personnel conditions within his command and by his obligation to keep them abreast of current de-

velopments, especially since the matter was one which had been brought to their attention initially by the Federal Employees Veterans Association itself.

In these circumstances, the consistent pattern of decisions of the lower federal courts, which has developed over a long period of time on the basis of this Court's decision in *Spalding* v. *Vilas*, 161 U. S. 483, establishes that petitioner's acts were absolutely privileged. This rule, stated simply, is that an officer of the Federal Government will not be subjected to liability in defamation for statements made within the scope of the authority of his office, and that this result will be reached without the necessity of a jury inquiry into questions of motivation and reasonableness of conduct.

In *Spalding* v. *Vilas, supra,* this Court held that the Postmaster General was immune from liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U. S. at 498. The immunity was absolute so that, as long as making the statements was "not unauthorized by law" (161 U. S. at 493) or beyond the scope of official duties, the existence of malice was immaterial. The immunity would not be lost "by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct." And in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient

that general legal authority for the act existed. The Court declared (161 U. S. 498–499):

> * * * In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premisis that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. * * *

In a case involving similar circumstances, the Court of Appeals for the District of Columbia Circuit held that the Secretary of Treasury was immune from liability with respect to an official letter written to the President and released to newspapers for general publication. *Mellon* v. *Brewer,* 18 F. 2d 168, certiorari denied, 275 U. S. 530. The Secretary's motive in submitting the letter was immaterial since it was an official report to a superior and hence absolutely

privileged. And it was immaterial that the President had not requested the report for "it certainly was not beyond the scope of the Secretary's duty and authority to submit one." 18 F. 2d at 171. And in *Glass* v. *Ickes*, 117 F. 2d 273, certiorari denied, 311 U. S. 718, the same court held that the head of an executive department was absolutely privileged to issue a libelous press release which related to official matters, and that, at least in the case of department heads, communications to the general public were within the scope of the official's authority and, therefore, entitled to immunity under the general rule.

In regard to official communications, the doctrine of *Spalding* v. *Vilas* has not been limited to heads of executive departments but has been applied to government officials below this level (see *infra*, pp. 31–33). Thus, in *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616, the Court of Appeals for the District of Columbia Circuit held that the making of an official report by an officer in the War Department to the Secretary of War was absolutely privileged. This result was necessary in order to avoid a serious restraint on "the perfect freedom which ought to exist in discharge of public duty * * *." 24 App. D. C. at 178. And the court followed this decision in *Farr* v. *Valentine*, 38 App. D. C. 413, holding that a communication to the Secretary of the Interior by the Commissioner of Indian Affairs charging the plaintiff with professional incompetency was absolutely privileged. Numerous other decisions

of various federal courts have reached the same result.[8]

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[8] *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.), was a case very similar to the present one. The court ruled that a libel action could not be maintained against a Navy officer for alleged defamatory statements contained in a written communication to one of his superior officers. The communication was held to be absolutely privileged regardless of the motive in making it, as long as it was authorized by law, was made in the course of official duty, and the statements contained in it were germane to an official subject matter.

In *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6), the report of a psychiatrist in the federal service made in the discharge of official duty was held absolutely privileged even though it was assumed that the statements contained in the report were false and actuated by malice And in *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R.I.), the court held that a disciplinary report by a supervisor in the Veterans Administration concerning an employee under her charge was absolutely privileged. Since the defendant had the duty of initiating and recommending action against the employee for unsatisfactory work, her motive in making such a report was held to be immaterial.

This same rule of immunity has been applied to a report of an investigation concerning an appeal proceeding before the Civil Service Commission (*Love* v. *Snyder*, 184 F. 2d 840 C.A. 6)), to defamatory statements by a member of the Tariff Commission to a former employee seeking reinstatement (*Smith* v. *O'Brien*, 88 F. 2d 769 (C.A. D.C.)), to publication of an announcement by the Collector of Internal Revenue that the plaintiff had been disbarred from practicing before the Treasury Department (*Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N.D. Ill.)), to statements of an American consul to the Secretary of State concerning the plaintiff's poor business reputation (*United States* v. *Brunswick*, 69 F. 2d 383 (C.A. D.C.)), to statements by an Internal Revenue agent to his superior in the course of official duties (*Harwood* v. *McMurtry*, 22 F. Supp. 572 (W. D. Ky.)), and to a letter written by an executive officer in response to a request for information from the chairman of a congressional committee (*Pearson* v. *Wright*, 156 F. Supp. 136 (D. D.C.)).

Nor has the doctrine of absolute immunity been limited to defamation suits. In *Yaselli* v. *Goff*, 275 U. S. 503, this Court, in a memorandum opinion, affirmed a decision of the Court of Appeals for the Second Circuit (12 F. 2d 396) holding that a Special Assistant to the Attorney General "in the performance of the duties imposed upon him by law, is [absolutely] immune from a civil action for malicious prosecutions * * *" (12 F. 2d at 406). The Court of Appeals ruled (*ibid.*) that "The public interest requires that persons occupying such important positions and so closely identified with judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions." This Court affirmed the judgment on the authority of *Bradley* v. *Fisher*, 13 Wall. 335, and *Alzua* v. *Johnson*, 231 U. S. 106, which dealt with the doctrine of absolute privilege in judicial proceedings. *Yaselli* v. *Goff* was thus a clear extension of the judicial immunity to executive officers whose functions demanded vigorous action and the exercise of judgment free from the danger of personal liability.

This case was followed by the Second Circuit in *Gregoire* v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U. S. 949, in a celebrated opinion by Judge Learned Hand. The court ruled that officers of the Department of Justice, irrespective of motives, could not be held personally liable for the wrongful internment of the plaintiff under the Alien Enemy Act of 1798. Judge Hand expressed the policy underlying the prin-

ciple of absolute immunity in these terms (177 F. 2d at 581):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.

In the similar case of *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643, the Court of Appeals for the District of Colum Circuit held officials of the Treasury and Justice Departments absolutely immune from liability for malicious prosecution. And in order to be within the scope of official duties, it was not necessary, the court ruled, that the acts be prescribed by statute or that they specifically be directed or requested by a superior officer. Further case authority in areas outside of defamation, is considerable and uniform in support of the principle of absolute privilege.[9]

[9] Officials of the Securities and Exchange Commission were held privileged as to acts done with respect to a securities registration statement in a suit involving a variety of tort claims. *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A. D.C.), certiorari denied, 314 U. S. 665. In actions for malicious prosecution, the defense of absolute immunity was available to officers of the Home Owners' Loan Corporation (*Adams* v. *HOLC*, 107 F. 2d 139 (C.A. 8)), to Commissioners of the District of Columbia (*Brown* v. *Rudolph*, 25 F. 2d 540 (C.A. D.C.), certiorari denied, 277 U. S. 605), to federal police officers (*Laughlin* v. *Garnett*, 138 F. 2d 931 (C.A. D.C.), certiorari denied, 322 U. S. 738), and to a state deputy fire marshal (*Phelps* v. *Dawson*, 97 F. 2d 339 (C.A. 8)). False imprisonment actions have been successfully defended on the ground of absolute privilege by military officers (*Keppleman* v. *Upston*, 84 F. Supp. 478 (N.D. Calif.)), by members of the U. S. Parole Board (*Lang* v. *Wood*, 92 F. 2d 211 (C.A. D.C.), certiorari denied, 302 U. S. 686), and by immigration officials (*Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U. S. 921). The Collector of Internal Revenue was held absolutely privileged in a suit for conversion of property which was seized in the collection of federal taxes (*Powell* v. *Rothensies*, 86 F. Supp. 201 (M.D. Pa.), affirmed on other grounds, 183 F. 2d 774 (C.A. 3)); and a supervisor in the Veterans Administration was held privileged in a damage suit based on the improperly motivated discharge of a government employee (*De Busk* v. *Harvin*, 212 F. 2d 143 (C.A. 5)).

In the present case, the court below recognized that this unbroken line of authorities in the federal courts required it to hold that petitioner was protected by an absolute immunity insofar as the report to his superior officers was concerned (R. 38). But the court refused to grant to petitioner more than a qualified privilege with respect to his sending copies of the report to interested members of Congress. In our view, there is no sound basis for so limiting the rule of absolute immunity. Both communications were equally a part of petitioner's official duty (R. 23, 39). Nor did the Court of Appeals suggest a rational distinction between them but merely remarked that to extend the protection of absolute immunity to the congressional report would be "an unwholesome thing" (R. 39).

As already noted (*supra*, pp. 15–17), copies of the report were transmitted to the Massachusetts congressional delegation in accordance with the Navy Department policy that members of Congress be kept informed by commanding officers of matters occurring within their commands in which the Congressmen have an official interest. Certainly, this policy is not only authorized but desirable, and uncontroverted affidavits established that petitioner was doing nothing more in this case than executing that policy (R. 20–23). The justification for it is apparent; its fruit is the free flow of information *within* the Government—from the executive branch to the legislative branch. Judge Woodbury expressed the idea in these terms (R. 41–42):

> I would say that Congress can be assured of receiving a free flow of unwatered down infor-

> mation of the kind it needs wisely to exercise its legislative supervision over the military establishment only if military officers like the defendant are free from the restraints naturally flowing from the fear of a lawsuit in which they might or might not succeed in convincing the trier of fact of their good faith. I see no occasion to anticipate that the rule I advocate would work undue hardship on persons defamed. The congressional audience is small and we ought to assume that no member of that body would be a party to the dissemination of calumny. * * *

See also *United States* v. *Harriss*, 347 U. S. 612, 625.

In refusing to accord petitioner an absolute immunity, the Court of Appeals departed from the broad underlying premise of every federal decision in this area, *i. e.*, that federal courts, without inquiring into questions of motivation, will not hold government officials personally liable in defamation for acts done in the performance of their duties.[10] For the Court of Appeals recognized that the copies were sent to Congress by petitioner "in the course of the

[10] Even the New York case relied on by the Court of Appeals did not depart from this principle (*Murray* v. *Brancato*, 290 N. Y. 52, 48 N. E. 2d 257). In holding that a state judge did not have an absolute privilege to publish a judicial opinion containing defamatory matters in an unofficial reporter, the New York court declared (290 N. Y. at 57, 48 N. E. 2d at 259):

"The plaintiff here seeks to hold the defendant for the publication of an opinion in *unofficial* reports and concededly the law placed upon the defendant no duty in connection with such publication.

"* * * a judge has no official duty in connection with any publication of opinions except in the official reports."

performance of his executive functions * * *." (R. 39). Even the two other federal appellate cases in which government officials have been denied the defense of absolute privilege (*Barr* v. *Mattec*, 244 F. 2d 767 (C. A. D. C.), judgment vacated, 355 U. S. 171; *Colpoys* v. *Gates*, 118 F. 2d 16 (C. A. D. C.)) did not depart from this recognized principle. In the *Colpoys* case, the court held that a United States Marshal was outside his "general line of duty," and hence not privileged, in issuing a statement to the press with respect to the discharge of two of his deputies for alleged malfeasance. In the court's view, since the marshal was not a policy-making official, no public interest required that his public discussion of the matter be protected in this way. In the *Barr* case, this rule was extended by the District of Columbia Circuit to include policy-making officers below cabinet or comparable rank, and the court held that the Acting Director of the Office of Rent Stabilization went outside his line of duty in issuing a statement to the press concerning disciplinary action to be taken by him against two of his subordinates. In both cases, the court adhered to the general rule that acts done in the performance of official duties are absolutely privileged but held that the officers involved were not performing such duties when they engaged in a general public discussion of official matters.[11]

[11] In the *Barr* case, we have taken the position that the District of Columbia Circuit's concept of "general line of duty" does not conform to the test laid down by this Court in *Spalding* v. *Vilas*, *supra*, so that the effect of the decision is the same as that of the court below in the present case. A second petition for certiorari in *Barr* is being filed by the Government this month.

It may be argued that "scope of authority" cannot encompass an act motivated by malice, since no public official is authorized to perform his duty in that manner nor is there any social interest to be gained from such conduct. See *Gibson* v. *Reynolds*, 172 F. 2d 95, 98-99 (C. A. 8), certiorari denied, 337 U. S. 925. But such reasoning would entirely defeat the doctrine of absolute immunity which is designed to avoid the burden of an inquiry into these very matters. As stated by Judge Hand (*Gregoire* v. *Biddle*, *supra*, at 581), "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." The policy underlying the immunity rule is that the importance of protecting the performance of public duties is not lessened by the presence of a questionable motivation. The performance of the duty is still a part of an official function even though the officer involved does not lament the fact that his action may result in harm to certain individuals.

Thus, in the present case, petitioner found it necessary to withdraw recognition of the Federal Employees Veterans Association as a representative group at the Boston Naval Shipyard and to explain his action to his superior officers and interested members of Congress. These acts were done by petitioner in order to carry out the functions of his position as commanding officer of the shipyard. Even if he were indifferent to the incidental effects which his action would have on the respondents, it would not detract from the im-

portance of protecting that action to insure proper shipyard administration. It is this latter factor which is the dominating consideration.

B. *Adequate protection of the interests which give rise to the privilege requires that the privilege be absolute*

In our view, if the purpose of the rule of immunity is to be effectuated, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such difficult questions of fact as proper motivation and reasonableness of conduct. As the court below noted (R. 38), the policy underlying the rule is not that a federal officer by virtue of his position should have a privilege to defame or to act maliciously, but that a greater public interest requires that the officer, in the discharge of his duties, be uninhibited by the fear of an onerous lawsuit or of substantial personal liability growing out of a jury opinion as to the reasonableness or wisdom of his conduct.

The qualified privilege is forfeited by the use of "excessive" language, by an "excessive" publication, by an "improper" motive, or by the absence of a reasonable belief in the truth of the statements made. See Prosser, *Torts*, § 95, p. 629 (2d ed. 1955). These are matters for a jury determination and obviously cannot be measured easily. The purpose of the rule of absolute immunity is to end litigation at its inception without the necessity for an inquiry into these matters. The decision of the Court of Appeals subjects the official to just such a burdensome trial in every case. Officials, aware of this risk, will act with

greater caution than a proper performance of their duties warrants.[12] They will choose to remain silent in situations in which the public interest requires that they speak out fully and frankly.

The limitations of the protection afforded by the defense of qualified privilege render it inadequate for the important public interests which are almost always involved in cases of government officials. However the rule of qualified privilege may be stated, ultimately the defendant-officer will be faced with the burden of having to provide a justification for his official action. See Prosser, *Torts*, § 95, p. 629 (2d ed. 1955). While such a burden on a defendant may be appropriate when the privilege is accorded for the protection of legitimate private interests, it should not be placed upon officials charged with the responsibility for the conduct of public affairs. These are matters committed to the judgment of the officers and their superiors and which should not be reviewed after the event,[13] to the officers' personal detriment, by court or jury.

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[12] As expressed by Judge Hand (*Gregoire* v. *Biddle*, *supra*, at 581):

"[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. * * *"

[13] What has been said in support of an absolute privilege in judicial proceedings is equally applicable to executive officers: "What judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the

To free the executive officer from the fear of personal liability in damages does not mean that his action will go entirely unchecked. Especially in the case of lesser officials, the elements of supervision and discipline are ever present. As stated by Judge Woodbury with respect to this case (R. 42), "As far as sanctions are concerned, it seems to me that fear of military discipline, perhaps at the instigation of a member of Congress outraged at the libel of a constituent, provides an adequate deterrent."

Nor is the threat of personal liability the only excessive deterrent on the official's conduct as the result of according him only a qualified privilege. Since questions of fact must be litigated, the time, effort, and expense involved in the litigation combine to deter freedom of action, even though there would be a substantial chance of a favorable decision if the officer were to take the action and run the risk of litigation. And from the public's point of view, the drain on the official's time and energies, which must be devoted to a defense of his conduct, is readily apparent.

For these reasons, we believe that adequate protection of the public interest in vigorous performance of duties by executive officers requires that acts done in the course of performing those duties be absolutely privileged, without need for justification before a jury, and without the threat of personal liability for failure to make such a justification.

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administration of justice commented upon to a jury, and the propriety of it determined by them?" *Scott* v. *Stansfield*, [1868] L. R. 3 Ex. 220, 224. See note 9, *supra*.

C. *The nature of the duty being performed, and not the level of the officer's position, should determine the extent of the privilege*

This Court's decision in *Spalding* v. *Vilas*, 161 U. S. 483, firmly established the principle that heads of executive departments are wholly immune from liability in defamation with respect to official communications. As we have pointed out (*supra*, pp. 19–21), many federal decisions have applied this rule to officials below the department-head level provided that the statement in question was made within the scope of the officer's authority. Given the present complexity of governmental operation, such an application is necessary and inevitable. The head of an executive department cannot personally perform all of the functions of the department but must act through subordinates. Obviously, many of these subordinate officials are performing policy-making functions which involve judgment and discretion. In exercising that judgment, it is often required that statements be made to other officers in the department, to executive officials outside of the department, to members of other branches of government, and, on occasion, to the general public. The policy underlying the rule of absolute immunity is that these duties should be performed freely and vigorously; the rule's entire rationale is the public interest in the function being performed, and not a need that special privileges be attached to high-ranking offices.

The record in the present case establishes that, when he wrote the statements complained of, peti-

tioner was carrying out, as part of his official duties, an authorized departmental policy. As commander of the Boston Naval Shipyard, it was petitioner's obligation to keep interested members of Congress informed of important matters occurring within his command (R. 21, 22). Therefore, his particular position in the administrative hierarchy has no bearing; it is his function of supplying information to the legislative branch of government which requires protection.

In *De Arnaud* v. *Ainsworth,* 24 App. D. C, 167, appeal dismissed, 199 U. S. 616, the Court of Appeals for the District of Columbia Circuit rejected the contention that a subordinate official in the War Department was not entitled to the same immunity as the head of the department when he included defamatory material in an official report. The court ruled:—"It is * * * not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." 24 App. D. C. at 181; see also *Farr* v. *Valentine,* 38 App. D. C. 413.

The District of Columbia court followed this reasoning in *Cooper* v. *O'Connor,* 99 F. 2d 135, 142, certiorari denied, 305 U. S. 643, holding officials of

the Treasury and Justice Departments absolutely immune from liability for malicious prosecution:—"When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself."[14]

Dean Prosser has summarized the cases by stating that "The whole tendency has been away from any * * * distinction on the basis of rank, and the later decisions look rather to the duties which the officer is expected to perform." Prosser, *Torts*, § 95, pp. 612–613 (2d ed. 1955). This Court, in accordance with that development, should hold that petitioner is wholly immune from liability with respect to an official communication which he was required to make in the proper performance of his executive duties.

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[14] Similarly, in *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R. I.), the court declared (136 F. Supp. at 224):

"The growth of our governmental activities has long since prevented the head of a department from performing the many activities and duties within its sphere. Of necessity, there must be delegation of authority. And when the act done by a subordinate official occurs in the course of the official duty of a person clothed with authority and subject to the duty to act, it is the act of the department just as much as though performed by the head of that department. Thus the same reason for immunity from civil liability exists with respect to the acts of a subordinate official done in the exercise of his or her official functions."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and that of the District Court reinstated.

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